IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

Regular Second Appeal No.120 of 1996
Date of decision: 24.07.2007

Khushi Ram & Others ….**Appellants**

Versus

Milkhi ….**Respondent**

Coram

The Hon'ble Mr.Justice Dev Darshan Sud,J.

Whether approved for reporting ?[1]

For the Appellants: Mr.Ajay Sharma, Advocate.

For the Respondent: Mr.Baldev Singh, Advocate.

Dev Darshan Sud,J.

This is the plaintiffs' second appeal against the judgment and decree of the learned two Courts below dismissing the suit for possession of land measuring 0-00-18 square meters, bearing Khewat No.90 min, Khatauni No.220, Khasra No.961, situate in village Salongari, Tehsil and District Una.

The case pleaded by the plaintiffs was that the suit land was owned by the plaintiffs and during the recent settlement operation, the defendant-respondent Milkhi Ram in connivance with the settlement staff had the area, as described in the suit, entered in his name and has taken forcible possession without any right, title or interest.

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[1] ***Whether the reporters of Local Papers may be allowed to see the judgement***?

The defendant had pleaded that he has been in possession of this land from the time of his forefathers and which fact is in the knowledge of the plaintiffs and their predecessors-in-interest. The other allegations regarding the fact that they had connived in the wrong recording of the revenue entries etc. was denied.

Learned trial Court, as a fact, held that the plaintiffs were not entitled to the possession and that the defendant had become owner by way of adverse possession. In arriving at this conclusion, the learned trial Court, considered the documentary evidence on the record including Exs.D-4, D-5 and D-6, which were proceedings before the Settlement Tehsildar in case No.189/86 between Khushi Ram, Smt.Sarwani Devi, Smt.Mathra Devi, Smt.Garibo widow of Basanta against the present respondent, in which statement had been made by Smt.Garibo that the defendant Milkhi Ram had been in possession of the land which was a subject matter of the settlement proceedings (and which is the subject matter of these proceedings). It is un-disputed that these findings have not been challenged in any other proceedings and that the identity of the parties and the land is the same as in the present case. The learned trial Court also noticed that the plaintiffs had not appeared in evidence, but through their attorney Smt.Gurbachani Devi, who had admitted that the respondent was having his abadi on this land.

In appeal before the learned District Judge, after a detailed consideration of the evidence, documentary as well as oral, the findings of the trial Court were confirmed.

This appeal has been preferred by the plaintiffs and appears to have been admitted on the two substantial questions of law requiring determination, namely:

(2) Whether the courts below mis-appreciated the documentary and oral evidence with special reference to exhibit P-3?

(3) Whether the claim for adverse possession can be granted without there being any specific plea for the same?

Dealing first with question No.2. Ex.P-3 is the copy of the Parcha Jamindari, in which it has been recorded that Khushi Ram and others are the co-owners and Milkhi Ram is the tenant. However, in the remarks column, it is recorded that the column of possession is to be altered as ordered in case No.189/86 (which are the proceedings before the Settlement Officer). Learned counsel for the appellants submits that this document, does not record the possession of the respondent and that the case of the plaintiffs has been established when, this document is considered with the other oral and documentary evidence on the record.

It is undisputed that none of the plaintiffs has appeared in the witness box to substantiate the plea(s) raised by them in the plaint. There is no explanation on the record as to why the plaintiffs have absented themselves or stayed away from the witness box. While considering the evidence in its entirety, the fact that the plaintiffs have not appeared in the witness box is a vital fact to be considered which would make all the difference regarding the veracity of the claim put forth by them. It is obvious that the only attempt of the plaintiffs was to avoid cross-examination as the proceedings in Exs.D-4, D-5 and D-6 clearly established the relinquishment of the claim by the plaintiffs.

In ***Ishwar Bhai C.Patel @ Bachu Bhai Patel*** *vs.* ***Harihar Behera & Anr. JT 1999(2) SC 250***, the Hon'ble Supreme Court, after considering the law, has held:

> ***"16.*** *As early as in 1927, the Privy Council in* ***Sardar Gurbakhsh Singh v. Gurdial Singh and another, AIR 1927 Privy Council 230,*** *took note of a practice prevalent in those days of not examining the parties as a witness in the case and leaving it to the other party to call that party so that the other party may be treated as the witness of the first party. Their Lordships of the Privy Council observed as under:-*

> *"Notice has frequently been taken by this Board of this style of procedure. It sometimes takes the form of a maneuver under which counsel does not call his own client, who is an essential witness, but endeavours to force the other party to call him, and so suffer the discomfiture of having him treated as his, the other party's, own witness.*
>
> *This is thought to be clever, but it is a bad and degrading practice. Lord Atkinson dealt with the subject in* ***Lal Kunwar v. Chiranji Lal (1),*** *calling it "a vicious practice, unworthy of a high-toned or reputable system of advocacy."*

They further observed as under:-

"But in any view her non-appearance as a witness, she being present in Court, would be the strongest possible circumstance going to discredit the truth of her case."

17. *Their Lordships also took note of the High Court finding which was to the following effect:-*

> *"It is true that she has not gone into the witness*

box, but she made a full statement before Chaudhri Kesar Ram, and it does not seem likely that her evidence before the Subordinate Judge would have added materially to what she had said in the statement."

They observed:-

"Their lordships disapprove of such reasoning. The true object to be achieved by a Court of justice can only be furthered with propriety by the testimony of the party who personally knowing the whole circumstances of the case can dispel the suspicions attaching to it. The story can then be subjected in all its particulars to cross-examination."

18. *This decision has since been relied upon practically by all the High Courts. The Lahore High Court in* ***Kirpa Singh vs. Ajaipal Singh and others, AIR 1930*** *Lahore 1,observed as under:-*

"It is significant that while the plaintiffs put the defendant in the witness-box they themselves had not the courage to go into

> *the witness-box. Plaintiffs were the best persons to give evidence as to the "interest" possessed by them in the institution and their failure to go into the witness-box must in the circumstances go strongly against them."*

19. *This decision was also relied upon by the Bombay High Court in* ***Martand Pandharinath Chaudhari vs. RadhabaiKrishnarao Deshmukh, AIR 1931 Bombay 97,*** *which observed as under:-*

> *"It is the bounden duty of a party personally knowing the facts and circumstances, to give evidence on his own behalf and to submit to cross-examination and his non-appearance as a witness would be the strongest possible circumstance which will go to discredit the truth of his case."*

20. *The Lahore High Court in two other cases in 1934, namely,* ***Bishan Das vs. Gurbakhsh Singh and another, AIR 1934 Lahore 63(2) and Puran Das Chela vs. Kartar Singh and others, AIR 1934 Lahore 398*** *took the same view.*

21. *A Division Bench of the Patna High Court in* ***Devji Shivji vs.***

Karsandas Ramji and another, AIR 1954 Patna 280, *relying upon the decision of the Privy Council in* ***Sardar Gurbakhsh Singh vs. Gurdial Singh and another*** *(supra) and the Madhya Pradesh High Court in* ***Gulla Kharagjit Carpenter vs. Narsingh Nandkishore Rawat, AIR 1970 Madhya Pradesh 225*** *have also taken the same view. The Madhya Pradesh High Court also relied upon the following observation of the Calcutta High Court in* ***Pranballav Saha & Anr. vs. Sm.Tulsibala Dassi & Anr., AIR 1958 Cal. 713 :-***

> *"The very fact that the defendant neither came to the box herself nor called any witness to contradict evidence given on oath against her shows that these facts cannot be denied. What was prima facie against her became conclusive proof by her failure to deny.*

22. The Allahabad High Court in ***Arjun Singh v. Virender Nath and another, AIR 1971 Allahabad 29,*** *held that:*

> *"the explanation of any admission or conduct on the part of a party must, if the party is alive and capable of giving evidence, come from him and the court would not*

imagine an explanation which a party himself has not chosen to give.:

It was further observed that:-

"If such a party obtains from entering the witness box it must give rise to an inference adverse against him".

24. *A Division Bench of the Punjab & Haryana High Court also in* ***Bhagwan Dass v. Bhishan Chand and others, AIR 1974 Punjab & Haryana 7,*** *drew a presumption under Section 114 of the Evidence Act that if a party does not enter into the witness box, an adverse presumption has to be drawn against that party.*

25. *Applying the principles stated above to the instant case, it would be found that in the instant case also the appellant had abstained from the witness box and had not made any statement on oath in support of his pleading set out in the written statement. An adverse inference has, therefore, to be drawn against him. Since it was specifically stated by respondent No.2 in his statement on oath that it was at the instance of the appellant that he had issued the cheque on the account of respondent No.1 in the Central Bank of India Ltd., Sambalpur*

Branch, and the appellant, admittedly, had encashed that cheque, an inference has to be drawn against the appellant that what he stated in the written statement was not correct. In these circumstances, the High Court was fully justified in decreeing the suit of respondent No.1 in its entirety and passing a decree against the appellant also."

Similarly, in ***Vidhyadhar*** *vs.* ***Manikkrao & Anr. JT 1999(2) 183,*** it has been held that:

*"**17.** Where a party to the suit does not appear into the witness box and states his own case on oath and does not offer himself to be cross examined by the other side, a presumption would arise that the case set up by him is not correct as has been held in a series of decisions passed by various High Courts and the Privy Council beginning from the decision in **Sardar Gurbakhsh Singh v. Gurdial Singh and another, AIR 1927 Privy Council 230.** This was followed by the Lahore High Court in **Kirpa Singh v. Ajaipal Singh and others AIR 1930 Lahore 1** and Bombay High Court in **Martand Pandharinath Chaudhari v. Radhabai Krishnarao Deshmukh, AIR 1931 Boimbay 97.** The Madhya Pradesh High Court in **Gulla Kharajit Carpenter v. Narsingh Nandkishore Rawat, AIR 1970 Madhya Pradesh 225** also followed the*

Privy Council decision in Dardar Gurbakhsh Singh's case (supra). The Allahabad High Court in ***Arjun Singh v. Virender Nath and another, AIR 1971 Allahabad 29*** *held that if a party abstains from entering the witness box, it would give rise to an inference adverse against him. Similarly, a Division Bench of the Punjab & Haryana High Court in* ***Bhagwan Dass v. Bhishan Chand and others, AIR 1974 Punjab & Haryana 7,*** *drew a presumption under Section 114 of the Evidence Act against a party who did not enter into the witness box".*

These judgments have been followed by this Court in ***Tokha vs. Smt.Biru and others, AIR 2003 Himachal Pradesh 107,*** when an adverse inference was drawn against the person who had failed to appear as a witness in the case. It has been held that:-

> ***"24.*** *Admittedly, the plaintiff has not stepped into the witness box. Her special attorney has appeared as PW-1. One of the material issue involved in the present appeal is whether the donee or after his death the defendants have failed to provide maintenance to the plaintiff and thus the deed of gift and the consequential mutation of the estate of the deceased Singh in favour of the defendants are liable to be set aside. It was the plaintiff to state and rebut that the deed of*

gift executed by her in favour of the donee was conditional and after the death of the donee the defendants have failed to maintain her. PW-1 has simply pleaded ignorance to the facts. On the failure of the plaintiff to step in the witness box and depose in support in the witness box and depose in support of her case and to subject herself to cross-examination, an adverse inference will have to be drawn against her. The appearance of special attorney cannot be treated as having appeared in the capacity of plaintiff. Such appearance is only as a witness in his personal capacity. It has been held by the Supreme Court in Vidadhar v. Manikrao, (1993) 3 SCC 573: (AIR 1999 SC 1441) that where the plaintiff to the suit does not appear in the witness box and states his own case on oath and does not offer himself to be cross-examined by the other side, a presumption would arise that the case set up by him is not correct. (see Gurdev Singh v.Gulabrao, 2000(3) Shiml.L.C. 285, Mohinder Singh v.Kurukshetra University 2001(2)Shim LC 246, Harswarukp v. Ram Lok Sharma, 2000(3) Shim.L.C., 160; Ishwar Bhai C.Patel v. Harihar Behera, 1999(2) Current Civil Cases 171: (AIR 1999 SC 1341) (SC): Roshan Lal v. Krishan Dev, 2002 (1) Cur LJ (HP) 261 and

Ram Parsad V. Hari Narain, AIR 1998 Rajasthan 185 (Jaipur Bench).

25. *In Rattan Dev v. Pasam Devi, (2002) 7 SCC 441, the Supreme Court has held that the proposition of law laid down in Ishwar Bhai C.Patel v. Harihar Behera, (AIR 1999 SC 1341) is undoubtable wherein it has been emphasized that withholding of the plaintiff himself from the witness box and thereby denying the defendant an opportunity for cross-examination of himself results in an adverse inference being drawn against the plaintiff.*

26. *Since the plaintiff has failed to step in the witness box, an adverse inference has to be drawn against her and as such she cannot be said to be entitled for relief sought for in the suit. The other evidence adduced by the plaintiff does not support the case of the plaintiff that she was not at all maintained by the defendants. The finding of the first appellate Court which is to the contrary is liable to be set aside".*

The Hon'ble Supreme Court in ***Bajranglal Shivchandrai Ruia vs. Shashikant N.Ruia and others, AIR 2004 SC 2546,*** while dealing with the effect of issuance of a sale certificate, held that in the absence of any of the competent officers of the plaintiff appearing in the witness box substanting the

averments in the plaint or in the appeal, no relief could be granted to the plaintiff. It was held:-

> ***"96.*** *… … … … … … … … … …The Division has made a very curious finding that "the sale certificate was issued in favour of the plaintiff by the Corporation and was duly registered." We must say that this finding is totally without basis. The sale certificate exfacie shows that it was given in the name of plaintiff Satyavati and there is no record in the BMC books that the plaintiff was registered as the highest bidder nor as a purchaser in the auction sale. Neither the plaintiff Satyavati, Janardan Dhuri, nor any competent officer of the BMC entered the witness box to explain this discrepancy as to how the sale certificate was issued in the name of Satyavati when the highest bidder was Janardhan Dhuri, who did not even claim to have bid as an agent of Satyavati. It is only in the plaint that the plaintiff for the first time claimed that she had paid the entire price of the auction sale. This was an averment in the plaint which was not substantiated by any evidence. Nonetheless, the Division Bench facilely accepted this averment and held that the sale certificate was issued in favour of the plaintiff as Janardan Dhuri was the highest bidder and because he was in the employment of Ramprasad, the certificate of the sale*

could be in the name of Satyavati and it conveyed her good title. To say the least the reasoning appears to be faulty".

In ***Janki Vashdeo Bhojwani and another*** *vs.* ***Indusind Bank Ltd. and others AIR 2005 SC 439,*** the Hon'ble Supreme Court laid down :-

"In the context of the directions given by this Court, shifting the burden of proving on the appellants that they have a share in the property, it was obligatory on the appellants to have entered the box and discharged the burden by themselves. The question whether the appellants have any independent source of income and have contributed towards the purchase of the property from their own independent income can be only answered by the appellants themselves and not by a mere holder of power of attorney from them. The power of attorney holder does not have the personal knowledge of the matter of the appellants and therefore he can neither depose on his personal knowledge nor can he be cross-examined on those facts which are to the personal knowledge of the principal.

Order III, Rules 1 and 2 CPC, empowers the holder of power of attorney to "act" on behalf of the principal. In our view the word "acts" employed in Order III, Rules 1 and 2 CPC, confines only in respect of

> *"acts" done by the power of attorney holder in exercise of power granted by the instrument. The term "acts" would not include deposing in place and instead of the principal. In other words, if the power of attorney holder has rendered some "acts" in pursuance to power of attorney, he may depose for the principal in respect of such acts, but he cannot depose for the principal for the acts done by the principal and not by him. Similarly, he cannot depose for the principal in respect of the matter which only the principal can have a personal knowledge and in respect of which the principal is entitled to be cross-examined".*

Precedent on the point need not be multiplied. What were the circumstances which prevented the plaintiff from appearing as witness in rebuttal to the claim of the defendant that the possession of the land had been acknowledged in favour of the defendant by none other than Garibo Devi who was a plaintiff in the suit and related to the plaintiffs. The attorney has no personal knowledge regarding the matter and barring a bald statement in examination-in-chief that the plaintiffs are the owners in possession of the land, no attempt has been made by her to substantiate this plea.

In these circumstances, an adverse inference has to be drawn against the plaintiffs that in case

any of them have stepped into the witness box, it would have been contrary to their interest on any deposition which they have made supporting the case.

Even otherwise, on a consideration of Ex.P-3, I do not find that it makes any substantial difference in the case pleaded by the plaintiffs for the consideration to be made by the two courts below on the issues as framed. The question is answered against the appellants.

The possession having been acknowledged and admitted by late Smt.Garibo who consented and accepted in proceedings under the Land Revenue Act that the respondent is the rightful owner in possession, a further statement to take positive action directing the possession to be recorded in the name of the defendant, is an admission of the right of the defendant, which has not been explained and is binding on the appellants.

In the facts and circumstances of the case and in view of my findings on question No.2, I hold that there is no merit in this appeal. The concurrent findings of two Courts below are well reasoned and based on a correct appreciation of the evidence on record. This appeal is accordingly dismissed. There shall be no order as to costs.

July 24, 2007. **(Dev Darshan Sud)**
(aks) **Judge.**